IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LON MARTIN a/k/a LON MILLER, Appellant.	No. 32881-0-II UNPUBLISHED OPINION

ARMSTRONG, J. -- Lon Paul Martin, a/k/a Lon Miller[1] seeks review of the trial court's ruling that his trial counsel effectively represented him even though counsel did not ask that Martin be examined to determine his competency to stand trial. The court had convicted Martin of first degree murder in 1998. Martin filed a personal restraint petition and Division One of this court remanded the case to the Kitsap County Superior Court for an evidentiary hearing on whether Martin's trial counsel should have requested a competency evaluation for Martin. Because the trial court's unchallenged findings support its conclusions that Martin understood the nature of the charges against him and effectively participated in his defense, we affirm.

FACTS

Lon Martin, filed a personal restraint petition seeking to overturn his conviction for first degree murder. In *In re Miller*, No. 52793-2-I, Division One held that nothing about Martin's court appearances should have alerted the trial court to order a competency evaluation on its own. But Division One referred the matter to the Kitsap County Superior Court for a hearing on whether Martin's counsel should have asked for a competency evaluation.

[1] We refer to the appellant as Lon Martin (Martin).

At the reference hearing, the court heard from Michael Henegen (Martin's trial counsel), the prosecuting attorney in the trial, Henegen's investigator, the investigator's former partner, Martin's stepfather, Martin's mother, a psychiatrist who treated Martin in 1995 and 1996, a psychiatrist who has treated Martin since his 1998 commitment to the Department of Corrections, and from Martin himself.

At the close of the hearing, the court entered written findings of fact and conclusions of law. The court found Henegen credible, commenting that he was aware of Martin's mental health issues throughout the pretrial and trial proceedings and that Henegen "would have requested a competency evaluation had Martin not been able to assist him in his defense or if he did not appear to understand the nature of the charges or the proceedings." Clerk's Papers (CP) at 5. The court also found that Martin never expressed confusion to Henegen.

The trial court reasoned that "while it might have been prudent for Henegen [to request a competency evaluation], the facts and circumstances known to Henegen . . . [did] not . . . create a reason to doubt Martin's competency." CP at 10. The court further found that, "based on Dr. Kolden's[2] opinions, and to a certain extent Dr. Cagle's[3] comments . . . there is a reasonable probability that Martin would have been found competent had he been sent to Western State and evaluated for competency" during pretrial and trial (1997 and 1998). The trial court concluded that Martin failed to prove flaws in Henegen's representation or that such representation prejudiced Martin. The court denied Martin's claim that he was ineffectively represented.

[2] Kolden is the psychiatrist that has treated Martin since his 1998 commitment to the Department of Corrections.

[3] Cagle is the psychiatrist that treated Martin in 1995 and 1996.

ANALYSIS

I. Standard of Review

A claim that counsel was ineffective presents a mixed question of law and fact. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 86 L. Ed. 2d 674 (1984)). We review a trial court's findings of fact in a reference hearing for substantial supporting evidence. *Brett*, 142 Wn.2d at 873 (citing *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 679-80, 101 P.3d 1 (2004) (citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997)); *see also In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (an appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence) (citations omitted).

Because Martin does not assign error to any of the trial court's findings of fact, we consider them verities. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). But we review de novo a trial court's conclusions of law entered in a reference hearing. *Brett*, 142 Wn.2d at 873-74 (citing *State v. Davis*, 25 Wn. App. 134, 137 n.1, 605 P.2d 359 (1980).

II. Ineffective Assistance of Counsel

A. Ineffective Assistance in General

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland*, 466 U.S. at 684-86; *Davis*, 152 Wn.2d at 672. Counsel is ineffective when his performance

falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *Strickland*, 466 U.S. at 687. In a reference hearing, the defendant bears the burden of establishing prejudice by a preponderance of the evidence. *Davis*, 152 Wn.2d at 679 (citing *Gentry*, 137 Wn.2d at 410). A defendant establishes prejudice by showing "a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (citing *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). Furthermore, a defendant must prove both prongs of the *Strickland* test. *Strickland*, 466 U.S. at 697.

To avoid the distortion of hindsight, we presume that counsel effectively represented the defendant. *Strickland*, 466 U.S. at 689; *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

B. Competency

The Fourteenth Amendment's due process clause prohibits courts from convicting a person who is not competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Under the federal constitution, a criminal defendant is competent to stand trial when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational[,] as well as factual[,] understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). In the state of Washington, "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050.

To determine whether a criminal defendant is legally competent to stand trial, we ask whether the defendant (1) understands the

nature of the charges; and (2) is capable of assisting in his defense. *In re Pers. Restraint of Flemming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (citing *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986)). A medicated defendant may still be competent to stand trial if the medication enables him to understand the proceedings and to assist in his own defense. RCW 10.77.090(7). But once reasonable doubt exists as to a defendant's competency, the court must,

> on its own motion or on the motion of any party[,] . . . appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a); *see State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982) (RCW 10.77.060(1)'s procedures are mandatory).

C. Henegen's Failure to Request a Competency Evaluation

Martin argues that Henegen, although aware of his mental health problems, failed to thoroughly investigate his mental illness history. Martin maintains that Henegen's representation was flawed by his failure to seek a competency evaluation.

1. The Findings

The court found that Henegen was credible; Henegen first saw Martin on June 17, 1997, and met with him weekly until trial started in April 1998; Henegen and Martin attended 24 or 25 pretrial hearings; Henegen reviewed Dr. Cagle's notes and was aware that Martin had a history of serious mental health issues; Dr. Cagle treated Martin during 1995 and 1996, and believed he had multiple personalities and disassociative identity disorder, conditions evidenced by "time loss"[4]

[4] Dr. Cagle's reports state that Martin would arrive for treatment and not recall having seen Dr. Cagle during the previous week or would forget that he missed a session in the previous week. The reports also show that occasionally Martin would remember seeing Dr. Cagle during the previous week, but could not recall specifics about their conversations.

and "alters" (CP at 5);[5] Henegen did not witness any of the symptoms described by Dr. Cagle; Martin always appeared to understand Henegen, was not confused, recalled their previous meetings, always understood where he was and why he was there, focused on the issues and was helpful and coherent; Martin explained to Henegen his relationship with the victim and a possible witness, his relationship with his stepfather, his treatment by Dr. Cagle, and his police interview.

The trial court further found that Jeanne Booth, Martin's mother, talked with Henegen about Martin's mental state in jail but never raised a question about his competency; Lloyd Booth, Martin's stepfather,[6] admitted that Martin appeared to understand the charges and would be able to participate in the defense; Dr Kolden evaluated Martin in 1998 after his conviction and although Dr. Kolden believed that Martin had significant mental health issues, he believed Martin understood the charges and the proceedings, and would have been capable of assisting Henegen in his defense.

Finally, the trial court found that Martin presented no "red flags" during pre-trial or trial that would have alerted Henegen to the need for a competency evaluation and that if Martin's behavior had suggested such a need, Henegen would have requested one. CP at 5.

On the basis of these findings, the court concluded that although Henegen should have asked for a competency evaluation if there was reason to doubt Martin's competency, the facts and circumstances known to Henegen "were not such as to create a reason to doubt Martin's competency." CP at 10.

2. Martin's Argument

[5] Dr. Cagle uses the term "alters" to describe the multiple personalities Martin possessed and occasionally displayed during treatment sessions. Exhibit at 7.
[6] Lloyd Booth was a psychiatric nurse in the Navy. His certification expired in 1990.

Martin relies on *In re Personal Restraint of Brett* to support his claim that Henegen failed

to adequately investigate his mental health problems. In *Brett*, a jury convicted the defendant and sentenced him to death for aggravated first degree murder and first degree felony murder. *Brett*, 142 Wn.2d at 871. Brett subsequently filed a personal restraint petition alleging ineffective assistance of counsel during the guilt and penalty phases of his trial. *Brett*, 142 Wn.2d at 871. At the ensuing reference hearing, four medical experts testified that if defense counsel had investigated the defendant's history, counsel would have discovered that the defendant's disabilities seriously impaired his judgment, his ability to understand cause and effect, and ability to control his impulses. *Brett*, 142 Wn.2d at 874-76. In addition, three legal experts testified that defense counsel should have sought legal help after he recognized that it would take two lawyers at least 400 to 500 hours to adequately prepare and effectively try the defendant's case. *Brett*, 142 Wn.2d at 876-77. The legal experts also opined that Brett's counsel failed to conduct a reasonable inquiry into Brett's medical condition. *Brett*, 142 Wn.2d at 876-77.

The court faulted defense counsel for not (1) promptly seeking the appointment of co-counsel; (2) presenting a mitigation package to the prosecutor before he filed a death penalty notice; (3) promptly investigating relevant mental health issues; (4) seeking appointment of investigators; (5) seeking a timely appointment of qualified mental health experts; and (6) adequately preparing for the penalty phase by having relevant mental health issues fully assessed and by retaining, if necessary, qualified mental health experts to testify accordingly. *Brett*, 142 Wn.2d at 882. The court held that while the failure to perform one of these actions alone was "insufficient to establish ineffective assistance of counsel, *the failure to perform the combination of these actions* establishes that defense counsel's actions in Brett's trial were not reasonable under the circumstances of the case." *Brett*, 142 Wn.2d at 882-83.

The nature of Martin's claim and the

facts distinguish *Brett*. First, Martin does not claim that Henegen failed to investigate and prepare an insanity or diminished capacity defense, or prepare a mitigation argument. Rather, he claims only that Henegen should have investigated his competence to participate in the trial. And Henegen did investigate Martin's mental health history; he spoke with Martin's parents and family members, hired a private investigator to look into Martin's mental health issues, and obtained Dr. Cagle's records. Unlike the defendant in *Brett*, Martin presented no expert testimony establishing that Henegen's failure to request a competency hearing was unreasonable under the circumstances. *See Brett*, 142 Wn.2d at 876. The circumstances, according to the trial court's findings, showed that Martin understood the nature of the proceedings and was able to fully assist his counsel in the defense.

We conclude that the findings support the trial court's conclusion that Henegen had no reason to question Martin's competence during trial preparation and trial. Thus, Martin has not met his burden of establishing that Henegen rendered ineffective representation. *See Davis*, 152 Wn.2d at 679.

Moreover, even if we assume that Henegen should have asked for a mental evaluation of Martin's competence, Martin has not shown that the evaluator would have found him incompetent to stand trial. Neither Martin's mother or stepfather offered any testimony that Martin did not understand the nature of the proceedings or was having difficulty working with his attorney.

III. Statement of Additional Grounds (SAG)

Martin advances three additional grounds for review. He argues that (1) the court failed to question the credibility of several of the witnesses at his trial who Martin claims were drug addicts "that showed up in court under the effect" of drugs; (2) the State's primary witness at trial had questionable credibility because Henegen's law firm had previously represented her in a "mental health case;" and, (3) the trial court erred in precluding the State's primary witness from discussing "a gang's involvement with the murder of Brian Johnson." SAG 1-2.

None of Martin's asserted additional grounds for review arises from the reference hearing; rather, his contentions relate to alleged errors at his trial. The State tried Martin and committed him to the Department of Corrections in 1998. The 30-day time period for direct challenges to claimed procedural errors at trial has long expired. RAP 5.2(a). We decline to address Martin's statement of additional grounds for review.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, C.J.

Penoyar, J.